SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 515

W. E. B. DUBOIS CLUBS OF AMERICA, *et al.*,

Appellants,

—v.—

RAMSEY CLARK, Attorney General of the United States, *et al.*

OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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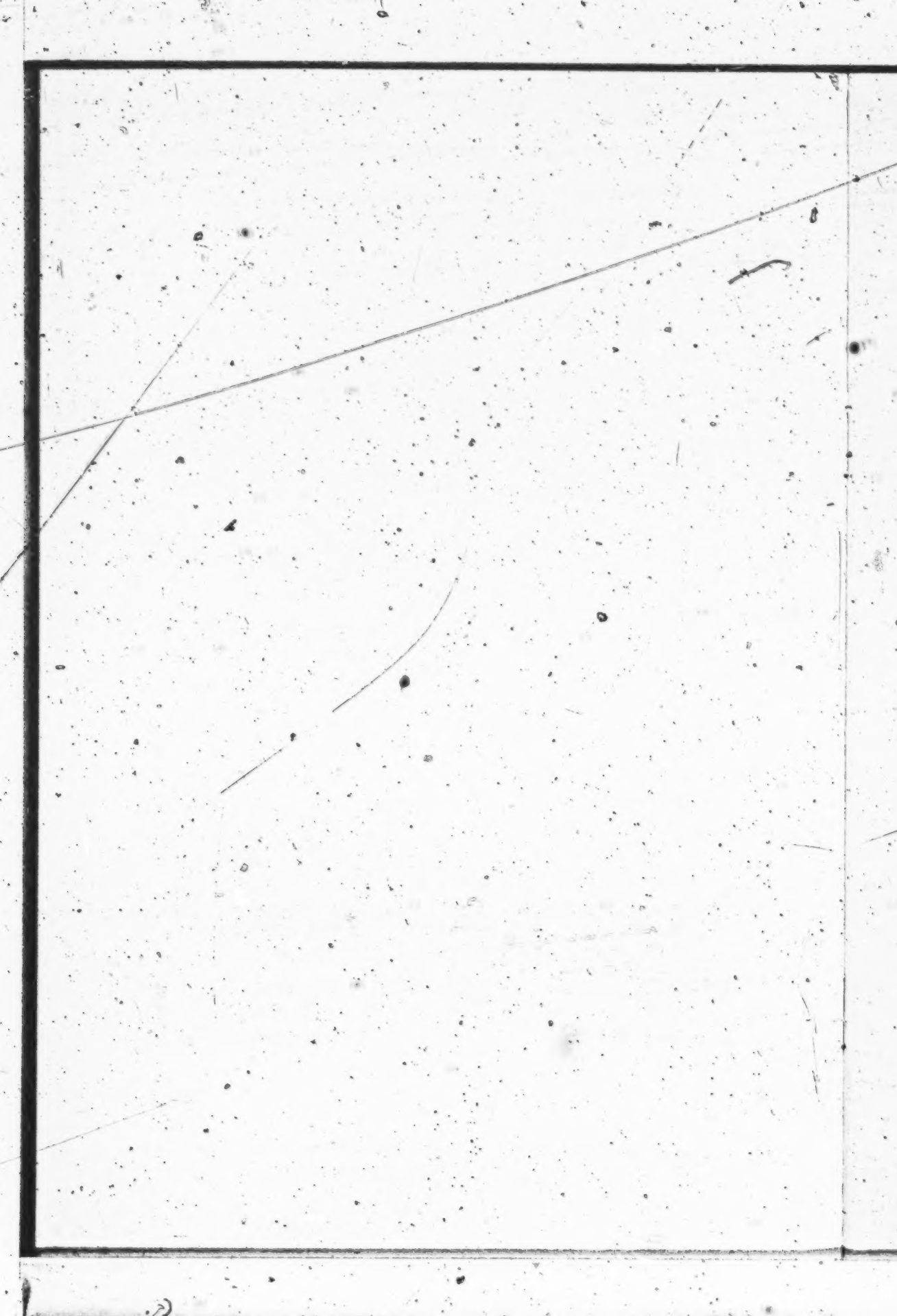

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The government has moved to affirm the judgment below on the sole ground that the district court was correct in its ruling that appellants were required to exhaust their administrative remedy before they were entitled to a hearing on the constitutional issues raised by the Communist-front provisions of the McCarran Act. In so doing the government ignores the realities of the situation which were so clearly acknowledged by former Attorney General Nicholas deB. Katzenbach.

Shortly after the filing of the petition in the present case, Mr. Katzenbach made the following comments as reported by the *Daily Princetonian* on April 6, 1966.[1]

[1] The government attached this interview to its motion to dismiss below, thus acknowledging its accuracy.

> "The Attorney General pointed out that in most of the 23 instances where the act has been invoked in the past, the organizations called before the SACB have collapsed soon after this. 'But, I suppose, in part, that was one of the major purposes of the act' he remarked."

Certainly, where the administrative remedy itself causes the destruction of an organization, appellants should not be required to exhaust that remedy in order to raise constitutional issues which appear on the face of the statute, particularly where "one of the major purposes of the act" is to destroy the organization before it can obtain judicial review.

In any event, the applicability of this Court's holding in *Dombrowski* v. *Pfister*, 380 U. S. 479, to a situation such as raised in the present case is, in itself, a serious and substantial question requiring resolution by this Court. Cf. *Zwickler* v. *Koota*, No. 29 this Term. The contention by the court below and by the government (motion to affirm, p. 5), that this Court's decisions in *American Committee* v. *SACB*, 380 U. S. 503, and *Veterans of the Abraham Lincoln Brigade* v. *SACB*, 380 U. S. 513, are dispositive of this question is totally without basis. The question of the necessity to exhaust administrative remedies as a prerequisite to challenging the McCarran Act on its face was neither raised, argued, or considered by the Court in those cases. As a minimum, it cannot be said that the question is "so insubstantial as not to need further argument" (Rule 16 of this Court). Indeed, the wholly substantial nature of the question was recognized by the court below when it granted,

over the government's objection, appellants' request to stay further administrative proceedings pending this Court's resolution thereof.

Respectfully submitted,

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